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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

NO. 121

SARAH N. BENEDUM and M. L. BENEDUM,
Petitioners,

v.

STANLEY GRANGER, Collector of Internal Revenue,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners respectfully show:

Summary Statement of the Matters Involved.

These are civil actions brought in the United States District Court for the Western District of Pennsylvania, one by Sarah N. Benedum, Petitioner herein, and the other by M. L. Benedum, Petitioner herein, against Stanley Granger, Collector of Internal Revenue for the 23rd District of Pennsylvania, Respondent herein. Each action was for the recovery of federal income taxes alleged to have been erroneously assessed and collected from

each Petitioner by reason of the disallowance of certain bad debt deductions claimed by the respective Petitioners in their respective 1936 Income Tax Returns. Each Petitioner paid the additional assessment together with interest and filed a claim for refund. The refund claims were disallowed by the Commissioner of Internal Revenue, whereupon, Petitioners filed suits to recover the amounts so paid together with interest from dates of payment. The trial before the court without a jury resulted in judgments in favor of Petitioners for the full amount of their respective claims. Appeals from said judgments were taken by Respondent to the Court of Appeals for the Third Circuit, which by judgments dated March 14, 1950 reversed the judgments of the District Court.

The bad debt deduction claimed by Sarah N. Benedum in her 1936 Income Tax Return, as well as in her claim for refund, was based upon the partial worthlessness of first mortgage bonds of Carbo-Oxygen Company, a Delaware corporation, acquired by her in the year 1923. The bad debt deductions claimed by M. L. Benedum in his 1936 Income Tax Return, as well as in his claim for refund, were based upon the partial worthlessness of first mortgage bonds of Carbo-Oxygen Company, acquired by him in 1928 and 1929, some as pledgee and others by purchase and upon the partial worthlessness of a claim against the said company which accrued to him by reason of his payment, as endorser, of one-half of a note of said company (R. 9a; R. 45a).

Carbo-Oxygen Company having met with financial difficulties, on May 1, 1936, as debtor, filed its petition in the District Court of the United States for the Western District of Pennsylvania for a reorganization under

77-B of the Bankruptcy Act. On July 14, 1936, by final decree in said proceedings the Court approved a Plan of Reorganization submitted by the debtor, and fixed August 1, 1936 as the effective date of the Plan. Pursuant to the terms of said Plan all assets of Carbo-Oxygen Company were transferred to a new corporation, viz, Carbo-Oxygen Company, Inc., and the preferred and common stock of the new company were turned over to the trustee in the reorganization proceedings for delivery to the stockholders and creditors of the old company upon surrender of their stocks and claims. Petitioners surrendered their claims against the old company and in exchange received stocks of the new company in accordance with the Plan. Petitioners measured their bad debt deductions by the difference between the cost basis of their claims and the fair market value of the stocks of the new company received in exchange therefor (R. 17a).

Upon review of the 1936 Income Tax Returns of Petitioners, the Revenue Agent in Charge disallowed the bad debt deductions on the ground that the reorganization constituted a nontaxable exchange under section 112 (g) (1) (B) of the Revenue Act of 1936, as amended by section 213 (g) (1) (B) of the Revenue Act of 1939, and the same ground was asserted by the Commissioner of Internal Revenue in disallowing Petitioners' claims for refunds. Thereafter, because of confusion which had arisen under prior law with respect to insolvency reorganizations, Section 112 (l) was added to the Internal Revenue Code by Section 121 (b) of the Revenue Act of 1943, c. 63, 58 Stat. 21, in order to govern the recognition or nonrecognition of gains or losses to the holders of stocks or securities of a corporation in

an insolvency reorganization; subsection 2 (B) of which provides in substance that if the reorganization occurred in a year prior to January 1, 1943, gain or loss upon an exchange of stocks or securities, (in cases not finally determined prior to May 25, 1944) shall be recognized or not recognized to the extent that it would be recognized or not recognized under the latest treatment of such exchange by such person prior to December 15, 1943. Petitioners never abandoned the bad debt deductions claimed in their 1936 Income Tax Returns. The Court of Appeals, however, held that Section 112 (1) (2) (B) was limited to the recognition or nonrecognition of capital gains or losses.

This Court Has Jurisdiction.

The judgments of the Court of Appeals for the Third Circuit were dated March 14, 1950. The jurisdiction of this Court is invoked under Section 1254 of the Judicial Code; Title 28 U. S. Code Annotated, Section 1254.

Question Presented.

Petitioners having claimed bad debt deductions under Section 23(k) of the Revenue Act of 1936, by reason of the partial worthlessness of bonds of a corporation and a claim against it exchanged for stocks of lesser value in a new corporation pursuant to a Plan for the reorganization of the corporation which issued the bonds, are such deductions recognizible under Section 112 (1) (2) (B) of the Internal Revenue Code.

Reasons Relied on For the Allowance of the Writ.

1. The decision of the Court of Appeals for the Third Circuit as to the construction of Section 112 (l) (2) (B) of the Internal Revenue Code by holding that it is applicable only to the recognition or nonrecognition of capital gains and losses involves an important question of federal law which has not been, but which should be settled by this Court.

The importance of the question becomes apparent from a consideration of the scope of said section of the Internal Revenue Code. It affects the tax liability of the stockholders and security holders of corporations reorganized in a taxable year beginning after December 31, 1933 and prior to January 1, 1943, under Section 77-B of the Bankruptcy Act or other insolvency reorganization proceeding, where the tax liability was not finally determined prior to May 25, 1944 pursuant to Section 112 (l) (2) (A) of the Code. We have no way of ascertaining the exact number of persons who may be affected, but it is common knowledge that there were many insolvency reorganizations during the period aforesaid, and that a great number of persons held stocks or securities in the corporations thus reorganized. Moreover, in some of the cases the incidence of the tax would not arise until the subsequent sale of the stocks or securities received in exchange for the stocks or securities of the reorganized company.

2. Section 112 (l) (2) (B) of the Internal Revenue Code was enacted to resolve some of the doubts and uncertainties under then existing law with regard to insolvency reorganzations; it was remedial legislation,

and it is important that this Court determine whether it is restricted to the recognition or non-recognition of capital gains or losses, as decided by the Court of Appeals for the Third Circuit. The purpose of adding Section 112 (1) to the Code is set forth in the report of the Conference Committee of the Senate and House of Representatives in the Internal Revenue Cumulative Bulletin 1944 at page 1063.

3. The narrow construction of Section 112 (1) (2) (B) by the Court of Appeals for the Third Circuit is at variance with the liberal construction of 112 (1) (2) (A) of the Internal Revenue Code by the Tax Court. In reaching its conclusion that 112 (1) (2) (B) was limited to the recognition or nonrecognition of capital gains or losses the Court of Appeals relied to some extent upon existing law on the subject. Whereas, in the case of Bertha A. Henry, 7 T. C. 228, the Tax Court, by Judge Arundel, said that the term "recognized" in Section 112 (1) (2) (A) of the Code is not employed in the sense of being "recognizable" under the law, on the contrary, "its significance is the actual treatment in fact accorded the particular transaction, without regard to whether that treatment was proper under the law then existing." The analysis of Section 112 (1) (2) (A) of the Code by the Tax Court would seem to apply also to Section 112 (1) (2) (B). The Court of Appeals made no reference to said decision of the Tax Court. The fact that the decision of the Court of Appeals is probably in conflict with the construction of Section 112 (1) by the Tax Court adds to the importance of the queston of federal law which should be settled by this court.

Wherefore, your Petitioners pray, that a writ of certiorari issue under the seal of this Court, directed to

the Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court of Appeals had in case numbered and entitled on its docket No. 10,011, Sarah N. Benedum, Appellee, v. Stanley Granger, Collector of Internal Revenue, Appellant, and also a full and complete transcript of the record and of the proceedings of said Court of Appeals had in case numbered and entitled on its docket No. 10,012, M. L. Benedum, Appellee, v. Stanley Granger, Collector of Internal Revenue, Appellant, to the end that these causes may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgments herein of said Court of Appeals be reversed by this Court, and for such further relief as to this Court may seem proper.

Respectfully submitted,

SARAH N. BENEDUM and M. L. BENEDUM

By .....

C. L. WALLACE
Counsel for Petitioners.

Dated ..... June 8, 1950.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

NO. .....

SARAH N. BENEDUM and M. L. BENEDUM,
Petitioners,

v.

STANLEY GRANGER, Collector of Internal Revenue,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion of the Court Below.

The opinion in the Court of Appeals for the Third Circuit is printed in full in the Record (R. 111a). To date the opinion has not been printed in the Federal Reporter. The original opinion was filed February 14, 1950. Thereafter a factual error in the opinion having been brought to the attention of the Court, by Order dated February 28, 1950, the mandate was stayed until further order of the Court, and on March 14, 1950 an Order was filed amending the opinion of February 14, 1950.

In the Court of Appeals the cases filed separately by the Petitioners above named were consolidated for

Brief, Appendix and Argument, and one Opinon was filed for both cases.

Jurisdiction.

1. The date of the judgments to be reviewed is March 14, 1950.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 1254 of the Judicial Code; Title 28 U. S. Code Annotated, Section 1254.

3. These cases involve the construction of Section 112 (l) (2) (B) of the Internal Revenue Code, relating to the tax liability of stockholders and security holders in corporations involved in insolvency reorganizations. The Court of Appeals has in these cases decided an important question of federal law which has not been, but should be, settled by this Court.

Statement of the Cases.

This has already been stated in the preceding petition under the heading "Summary Statement of the Matters Involved", page 1, which is hereby adopted and made a part of this brief.

Specifications of Errors.

1. The Court of Appeals for the Third Circuit erred in holding that the recognition or nonrecognition of gains and losses authorized by Section 112 (l) (2) (B) of the Internal Revenue Code is limited to capital gains and losses.

2. The Court of Appeals for the Third Circuit erred in holding that the bad debt deductions claimed by Petitioners in their respective 1936 Income Tax Returns were not recognizable under Section 112 (1) (2) (B) of the Internal Revenue Code.

ARGUMENT.

Summary of the Argument.

In her 1936 Income Tax Return Petitioner, Sarah N. Benedum, deducted as a bad debt the loss which she suffered by reason of the partial worthlessness of bonds of Carbo-Oxygen Company; likewise, in his 1936 Income Tax Return Petitioner, M. L. Benedum, deducted as bad debts the losses which he suffered by reason of the partial worthlessness of bonds of Carbo-Oxygen Company and of an unsecured claim against the company. Each Petitioner measured the loss by the difference between the cost basis of the bonds and claims and the value of stocks of the new company received in exchange upon the extinguishment of the bonds and claims, in accordance with a Plan for the reorganization of Carbo-Oxygen Company under Section 77-B of the Bankruptcy Act. In the first instance the bad debt deductions were disallowed on the ground that the reorganization constituted a nontaxable exchange under Section 112(g)(1)(B) of the Revenue Act of 1936. Said section was not designed to cover insolvency reorganizations and in order to resolve some of the doubts which resulted under the existing law Congress, by the Revenue Act of 1943, added Section 112(l) to the Internal Revenue Code.

It is now conceded that the cases come within the provisions of Section 112(l)(2)(B), but the Court of

Appeals held that said section applies only to capital gains and losses and reversed the judgments of the District Court in favor of Petitioners. This construction affects not only the Petitioners but all stockholders and security holders in corporations involved in insolvency reorganizations in a taxable year beginning prior to January 1, 1943. The construction of Section 112(l)(2)(B) is an important question of federal law which has never been passed on by this Court. Petitioners contend that Section 112(l)(2)(B) was remedial legislation which calls for a liberal rather than a narrow construction, and that the construction of said section by the Court of Appeals appears to be at variance with the liberal construction of Section 112(l)(2)(A) by the Tax Court. These contentions augment the importance of the federal question involved in these cases, which has not been, but should be, settled by this Court.

1. The construction of Section 112(l)(2)(B) of the Internal Revenue Code is an important question of federal law.

Section 121(b) of the Revenue Act of 1943, which added Section 112(l) to the Internal Revenue Code, was enacted on February 25, 1944. Section 112(l) relates to exchanges by security holders in connection with certain corporate reorganizations. Subsection (l)(1) deals only with future reorganizations and states the general rule to be that no gain or loss shall be recognized. Subsection (l)(2) provides that if the exchange occurred in a taxable year beginning prior to January 1, 1943 then gain or loss is to be recognized or not recognized * * * (A) to the extent that it was recognized or not recognized

in the final determination of the security holders' tax for such year, if such tax was finally determined prior to the 90th day after the enactment of the Revenue Act of 1943; and (B) in cases to which subsection (A) is not applicable, "to the extent that it would be recognized or not recognized under the latest treatment of such exchange by such person prior to December 15, 1943, in connection with his tax liability for such taxable year."

Section 112(l)(2)(B) retroactively amended and became a part of the Revenue Act of 1936, the year involved in these cases.

A reading of Section 112(l) discloses the broad effect of subsection 112(l)(2)(B). As already stated, it deals with the tax liability of every stockholder and security holder in a corporation which was involved in an insolvency reorganization in a taxable year beginning after December 31, 1933 and prior to January 1, 1943, except in those cases where there was a final determination prior to the 90th day after the enactment of the Revenue Act of 1943. The future applicability of said section is well stated in the case of *Bertha A. Henry,* 7 T. C. 228, by Judge Arundel at page 234 as follows:

> "* * * And, since insolvency reorganizations and exchanges in connection therewith occurring in earlier years would have their effect on the determination of basis and other questions in later years when, for example, securities acquired in the exchange might be disposed of, Congress deemed it wise to make the amendments retroactive, with certain qualifications. Obviously, however, in so doing Congress did not intend to allow a security holder who had taken a tax deduction for loss on account

of such an exchange in an earlier year, now closed, to obtain in effect a double deduction upon the disposition of the new securities in a later year, by virtue of using a carried over basis. So the net effect in such cases was to leave both the taxpayer and the Commissioner in the position in which they had placed themselves. * * *"

2. The narrow construction of Section 112(l)(2)(B) by the Court of Appeals is contrary to the purpose and express language of the Act.

The purpose of Congress in adding Section 112(l) to the Internal Revenue Code appears in the following excerpt from the Conference Committee Report of the Senate and House of Representatives as same appears in the Internal Revenue Cumulative Bulletin (1944) at page 1063:

> "Amendment No. 32: This amendment, for which there is no corresponding provision in the House Bill contains provisions designed to cover the reorganization transactions of certain insolvent corporations (other than railroad corporations) and to resolve some of the doubts and uncertainties which result from existing law as construed in the Supreme Court decisions. * * *"

Further light is thrown upon the purpose of Section 112(l) by the following language contained in the Senate Finance Committee Report (Internal Revenue Cumulative Bulletin, 1944, page 991):

> "* * * In general, gain or loss is recognized to the security holders when they surrender their old

securities for new securities pursuant to the reorganization. To the extent that the provisions are retroactive, the treatment previously accorded the securities holders is frozen."

The quotation from the Senate Finance Committee Report is pointed primarily to Subsection 112(l)(2)(A), but it seems equally applicable to Subsection 112(l)(2)(B), and the treatment previously accorded the transaction by the security holder should likewise be frozen. It is evident from the foregoing that Congress intended Section 112(l) to be remedial for the purpose of clarifying the confusion which had previously existed in the law, and consequently said section was entitled to a liberal construction.

Moreover, the language of Section 112(l)(2) does not expressly limit its operation to capital gains and losses, and no such limitations should be implied with regard to this remedial legislation. Had Congress intended the gains and losses to be so limited it would have been a simple matter to provide that the gains and losses recognizable under said section were to be subject to the capital gain and loss provisions of Section 117 of the Code.

Neither does the language of the Treasury Regulations 111, Section 29.112(1)-2, as added by T. D. 5402, 1944 Cum. Bull. 229, 234, 235, 236, limit the gains or losses therein dealt with to capital gains or losses. On the contrary, said Regulation provides that where there has been no final determination prior to May 25, 1944:

"* * * the recognition or nonrecognition of gain or loss shall depend upon the position last main-

tained by the taxpayer, prior to December 15, 1943, relative to the character of such exchange as one in which the *entire amount* of gain or loss is recognized or one in which *all* or a part of the gain or loss is not recognized. * * *"

"* * * If the taxpayer formally maintained that such exchange constituted a transaction upon which the *entire amount* of the gain or loss is recognized, then gain or loss, in the amount realized upon such exchange, shall be recognized. * * *" (Italics ours)

If the *entire* amount of gain or loss may be recognized in a transaction occurring in the year 1936, such gain or loss cannot be limited to a capital gain or loss if the asset exchanged was held for more than a year, and the Regulation, therefore, clearly excludes the narrow construction of Section 112(1)(2)(B) by the Court of Appeals.

The language of Section 112(1) indicates that it was not confined to an ordinary exchange of securities which would be subject to capital gains and losses. As appears in subsection (1) the exchange there referred to is "an exchange consisting of the relinquishment or extinguishment of stock or securities * * *". While under the Plan of Reorganization of Carbo-Oxygen Company (R. 17a) the transaction took the form of an exchange, it was in legal effect an extinguishment of the obligation evidenced by Petitoners' mortgage bonds, and is quite analogous to the transaction involved in the case of *Bingham v. Comm.*, 105 F. 2d 971 (1939). In that case the taxpayer having sold property and taken notes secured by purchase money mortgage for

part of the consideration, later took a reconveyance of the property upon surrender of the notes. The court held that the taxpayer was entitled to a bad debt deduction because there was not an exchange of assets and that the maker of the notes had merely succeeded in extinguishing his liabilities to the extent of the unpaid balance of the notes. To the same effect is *Comm. v. Spreckles,* 120 F. 2d 517 (1941).

To show further that Petitioners' claim of a bad debt deduction in the year 1936 appeared to be well founded it should be pointed out that Section 23(k) of the Revenue Act of 1936 and Article 23(k)4 of Regulations 94, applicable thereto, expressly authorized a bad debt deduction by reason of the worthlessness or partial worthlessness of bonds and similar obligations. Moreover, Treasury Department Form 1040 (individual income tax form) for the year 1936 contains in Item 16 the following:

> "Bad Debts (including bonds determined to be worthless during taxable year)."

It was not until this court decided the cases of *McClain v. Comm. and Comm. v. Thomson,* 311 U. S. 527, 85 L. Ed. 319 (decided January 6, 1941), that it was determined that Section 23(k), as same appeared in the Revenue Act of 1936, was limited by Section 117 of the Revenue Act of the same year. It is worthy of note that this court took jurisdiction in said cases because of conflicting decisions of different circuit courts of appeals with regard to the interpretation of Sections 117 and 23(k).

Regardless of the validity of Petitioners' bad debt deductions under the Revenue Act of 1936, the deduc-

tions appear to be recognizable under Section 112(l)(2)(B) and the purpose and language of said section do not warrant the narrow construction adopted by the Court of Appeals.

3. The narrow construction of Section 112(l)(2)(B) by the Court of Appeals is at variance with the construction of Section 112(l)(2)(A) by the Tax Court.

In reaching its conclusion that Section 112(l)(2)(B) of the Code was limited to the recognition or nonrecognition of capital gains or losses, the Court of Appeals relied to some extent upon the law as it existed prior to enactment of said section. Whereas, in the case of Bertha A. Henry, 7 T. C. 228, the Tax Court took the opposite view as appears from the following language by Judge Arundel, pages 233, 234:

> "It is apparent that the term 'recognized' in section 112(l)(2)(A) of the code is not employed in the usual sense attached to it in other sections, that is, in the sense of being 'recognizible' under the law. On the contrary, its significance is the actual treatment in fact accorded the particular transaction, without regard to whether that treatment was proper under the law then existing. In this connection the Senate Finance Committee report stated that to 'the extent that the provisions are retroactive, the treatment previously accorded the securities holders is frozen'. The Conference Committee report, in referring to the exception to the general rule of nonrecognition provided for those cases where the exchange occurred prior to 1943, stated that for 'such cases the recognition or

> nonrecognition of gain or loss upon the exchange is made to depend * * * if the tax liability for such taxable year has been finally determined, upon the treatment accorded such transaction in such final determination'. * * *"

The foregoing quotation seems equally applicable to Sections 112(l)(2)(A) and 112(l)(2)(B) and it would logically follow from the language of the Tax Court that the significance of the term "recognized" as used in Section 112(l)(2)(B) is the actual treatment in fact accorded the particular transaction by the taxpayer without regard to whether that treatment was proper under the law then existing.

The Court of Appeals made no reference to the decision of the Tax Court in the Bertha A. Henry case, and the variance between the viewpoints of the two tribunals emphasizes the need that the important federal question here involved be settled by this Court.

It is, therefore, respectfully submitted that these cases call for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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Counsel for Petitioners.

APPENDIX.

Statutes and Regulations Involved.

Internal Revenue Code:

SEC. 112. RECOGNITION OF GAIN OR LOSS.

"(1) (As added by Section 121 (b) of the Revenue Act of 1943, c. 63, 58 Stat. 21) Exchanges by Security Holders in Connection With Certain Corporate Reorganizations.—

(1) General rule. No gain or loss shall be recognized upon an exchange consisting of the relinquishment or extinguishment of stock or securities in a corporation the plan of reorganization of which is approved by the court in a proceeding described in subsection (b) (10), in consideration of the acquisition solely of stock or securities in a corporation organized or made use of to effectuate such plan of reorganization.

(2) Exchange occurring in taxable years beginning prior to January 1, 1943.—If the exchange occurred in a taxable year of the person acquiring such stock or securities beginning prior to January 1, 1943, then, under regulations prescribed by the Commissioner with the approval of the Secretary, gain or loss shall be recognized or not recognized—

(A) to the extent that it was recognized or not recognized in the final determination of the tax of such person for such taxable year, if such tax was finally determined prior to the ninetieth day after the date of the enactment of the Revenue Act of 1943;

(B) in cases to which subparagraph (A) is not applicable, to the extent that it would be recognized or not recognized under the latest treatment of such exchange by such person prior to December 15, 1943, in connection with his tax liability for such taxable year. (26 U. S. C. 1946 ed., Sec. 112.)"

Treasury Regulations 111, promulgated under the Internal Revenue Code:

"Sec. 29.112 (1)-2 (as added by T. D. 5402, 1944 Cum. Bull. 229, 234, 235, 236). Recognition of Gain or Loss Upon Exchange in Taxable Year Beginning Prior to January 1, 1943.—(a) * * *

(b) No final determination prior to May 25, 1944. If an exchange described in section 112 (l) (1), or so much of section 112 (c) or (e) as relates to section 112 (l) (1), occurred in a taxable year beginning prior to January 1, 1943, and the tax for such taxable year was not finally determined prior to May 25, 1944, the recognition or nonrecognition of gain or loss shall depend upon the position last maintained by the taxpayer, prior to December 15, 1943, relative to the character of such exchange as one in which the entire amount of gain or loss is recognized or one in which all or a part of the gain or loss is not recognized. For the purposes of this section, such position must have been formally maintained by the taxpayer in his return or amended return for the taxable year, in a claim for refund, in a proceeding before a court or The Tax Court or the Board of Tax Appeals, or in some formal action taken in connection with a determination or proposed determination of his tax liability

for such taxable year. If the taxpayer formally maintained that such exchange constituted a transaction upon which the entire amount of the gain or loss is recognized then gain or loss, in the amount realized upon such exchange, shall be recognized. If the taxpayer formally maintained that such exchange constituted a transaction upon which all or a part of the gain or loss is not recognized, then gain or loss shall not be recognized except to the extent that gain is recognized under section 112 (c)."

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * * * *

(k) Bad Debts.—Debts ascertained to be worthless and charged off within the taxable year (or, in the discretion of the Commissioner, a reasonable addition to a reserve for bad debts); and when satisfied that a debt is recoverable only in part, the Commissioner may allow such debt, in an amount not in excess of the part charged off within the taxable year, as a deduction.

* * * * * * *

Regulations 94 (Revenue Act of 1936)

"Art. 23 (k)—4—Worthless bonds and similar obligations. Bonds, if ascertained to be worthless, may be treated as bad debts to the amount actually paid for them. * * *

A taxpayer (other than a dealer in securities) possessing debts evidenced by bonds or other similar obligations can not deduct from gross income any amount merely on account of market fluctuation. If a taxpayer ascertains, however, that due, for instance, to the financial condition of the debtor, or conditions other than market fluctuation, he will recover upon maturity none or only a part of the debt evidenced by the bonds or other similar obligations and so demonstrates to the satisfaction of the Commissioner, he may deduct in computing net income the uncollectible part of the debt evidenced by the bonds or other similar obligations."

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BRIEF

FOR THE RESPONDENTS

IN

OPPOSITION

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 121

SARAH N. BENEDUM AND M. L. BENEDUM,
PETITIONERS

v.

STANLEY GRANGER, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 92-98) is reported in 82 F. Supp. 135. The opinion of the Court of Appeals (R. 111-117), as amended by order of the court (R. 121-122), is reported in 180 F. 2d 564.

JURISDICTION

The judgment of the Court of Appeals in the case of Sarah N. Benedum was entered on February 14, 1950 (R. 118); an amended judgment in her case, pursuant to an amendment in the court's opinion, was entered on March 14, 1950 (R. 122).

The judgment of the Court of Appeals in the case of M. L. Benedum was entered on February 14, 1950 (R. 119); although no petition for rehearing was filed within ninety days of that judgment, an order of court was entered on May 31, 1950, amending the date of the judgment to March 14, 1950 (R. 126), and an amended judgment dated March 14, 1950, was entered (R. 127). The amended judgment differed from the initial judgment only in its date, and no substantive change in the court's opinion relating to M. L. Benedum was made. See *infra*, pp. 5-6, 11-12. The petition for a writ of certiorari in both cases was filed on June 8, 1950. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED[1]

Where pursuant to a reorganization under Section 77 B of the Bankruptcy Act the taxpayers exchanged bonds of, and claims against, a corporation for stock of the new company and thereby sustained losses which they elected to recognize, whether the losses are subject to the limitations upon capital losses under Section 117 (d) of the Revenue Act of 1936, or are deductible in full as partial bad debts under Section 23 (k).

STATUTES AND REGULATIONS INVOLVED

The statutes and Regulations involved will be found in the Appendix, *infra*, pp. 13-17.

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[1] With respect to M. L. Benedum, there is the further question whether the petition was timely filed within the ninety-day period.

STATEMENT

The facts, as stipulated by the parties (R. 9-44, 45-85) and as found by the District Court (R. 86-87, 88-90), may be summarized as follows:

Sarah N. Benedum and M. L. Benedum, the taxpayers, had various claims against a corporation (R. 10-11, 46-48), which was reorganized in 1936 under Section 77 B of the Bankruptcy Act (R. 11-12, 49). The bulk of the claims consisted of first mortgage bonds of the old company. (R. 10-11, 47.) M. L. Benedum also held a promissory note of the old company secured by its mortgage bonds, to which bonds he had taken title prior to the taxable year because of default in payment of the note (R. 47), and he had a claim arising out of his payment as endorser of a note of the old company (R. 48).

In exchange for these claims against the old company and in accordance with the plan of reorganization, the taxpayers received stock of the new company with a fair market value substantially less than the bases of the taxpayers' claims against the old company. (R. 12, 13, 17-23, 50.) In the case of Sarah N. Benedum, the difference between the bases of the claims against the old company and the fair market value of the stock of the new company was $188,120.55, which she claimed as a deduction on her income tax return for 1936 as a bad debt. (R. 16, Schedule F.)[2] In the case of M. L. Benedum, the difference

[2] She also had an unsecured claim for which she received preferred stock in a less amount; she deducted the difference,

between the bases of the claims against the old company and the fair market value of the stock of the new company was $89,996.56, which he claimed as a deduction on his return for 1936 as a bad debt. (R. 61-62.)[3]

The Commissioner disallowed the deductions by both taxpayers on the ground that the transaction was a nontaxable exchange under Section 112 (g)(1)(B) of the Revenue Act of 1936, as amended. (R. 10, 29, 46, 73.) Deficiencies were assessed against the taxpayers which they paid (R. 14, 51), after which the taxpayers filed claims for refund which the Commissioner disallowed (R. 14-15, 52). Each taxpayer instituted a suit for refund in the District Court against the Collector (R. 1, 5), and recovered judgment (R. 99-100, 100-101). On appeal, the Court of Appeals reversed, holding that the disallowance of the claims for refund was proper, except as to the deduction from gross income by Sarah V. Benedum of $2,000, representing the statutory limit on capital losses (R. 111-117, 121-122).

The further facts relating to the timeliness of

$41,533.65, as a bad debt. (R. 16, Schedule F.) The aggregate of the two items was $229,654.20 (R. 16, Schedule F), but in her claim for refund she conceded that the item of $41,533.65 was applicable to a prior year, as shown by Exhibit D to Complaint, Note to Computation.

[3] The aggregate figure for bad debts on the return filed by this taxpayer, namely, $104,454.73 (R. 54, 61), includes some bad debt items other than claims against the old company. The break-down of the figure $89,996.56 may be found in the Revenue Agent's Report. (R. 81.)

the petition in the case of M. L. Benedum are as follows:

The Collector's principal argument on his appeal to the court below was that the losses were capital losses and therefore subject to the limitation of $2,000 plus capital gains under the terms of Section 117 (d) of the Revenue Act of 1936; the Collector recognized that under this argument Sarah N. Benedum would be entitled to a deduction of $2,000, whereas M. L. Benedum would not be entitled to a further deduction because he had already claimed the $2,000 limit. (R. 54, 58.) However, the court below stated in its original opinion that the Commissioner had already allowed the losses as capital losses (R. 112); if the statement were taken literally, it would mean that Sarah N. Benedum would not be entitled to an additional deduction of $2,000, although it would not affect M. L. Benedum because, as previously mentioned, he had already been allowed the $2,000 limit (R. 54, 58).

Counsel for Sarah N. Benedum informally (not in writing) requested the court to correct the opinion so that there could be no doubt that she was entitled to the $2,000 deduction. The Collector offered no objection and the court issued an order amending its opinion (R. 121-122) and amended the judgment in the case of Sarah N. Benedum (R. 122). The court did not amend the judgment in the case of M. L. Benedum, and

on March 29, 1950, issued mandates in both cases (R. 123-125), showing the date of the judgment in the case of Sarah N. Benedum to be March 14, 1950 (R. 124), and the date of the judgment in the case of M. L. Benedum to be February 14, 1950 (R. 125). No request was made for a change in the judgment in the case of M. L. Benedum until May 18, 1950 (more than 90 days after the original judgment (R. 119)), when a letter (which is not in the record) was written to the Clerk of the court below asking that the date of the judgment be changed for the purpose of filing a timely petition for a writ of certiorari. On May 31, 1950, the court below entered an order recalling the mandate and changing the date of the judgment to March 14, 1950 (R. 126), and on June 2, 1950, the amended judgment bearing the date of March 14, 1950, was filed by the Clerk of the court below (R. 127).

ARGUMENT

1. a. The decision of the court below is correct and there is no occasion for further review. The taxpayers, having exchanged the bonds of, and other claims against, the old company for stock of the new company, and not having retained the evidences of debt against the old company, are precluded from claiming the resulting losses as bad debts or partially bad debts under Section 23 (k) of the Revenue Act of 1936 (Appendix, *infra*, pp. 13-14). *Reed* v. *Commissioner*, 129 F. 2d 908 (C.A. 4); *Levy* v. *Commissioner*, 131 F. 2d 544 (C.A. 2),

certiorari denied, 318 U. S. 780; *Stoddard* v. *Commissioner,* 141 F. 2d 76 and 152 F. 2d 445 (C.A. 2). Cf. *McClain* v. *Commissioner,* 311 U. S. 527, which holds in effect that where a taxpayer exchanges a chose in action for something else he is precluded from claiming a deduction on account of a bad debt. While the controverted question in *McClain* was whether or not there was a "retirement" of the bonds (within the meaning of Section 117 (f) of the Revenue Act of 1934), in cases where the obligor paid the bondholders a fractional part of the principal amount of the bonds—so as to constitute the transactions an exchange under that section [4]—the undisputed underlying assumption was that comparable bond transactions which did constitute a recognized sale or exchange could not be included in the category of bad debts. 311 U. S., at 529. In the present case, since there was an actual exchange of the bonds of (and of other

[4] Section 117 (f) of the Revenue Act of 1934 is identical with Section 117 (f) of the Revenue Act of 1936 (Appendix, *infra,* p. 15). Prior to 1934, the Bureau of Internal Revenue treated the redemption of bonds as neither a sale nor an exchange, so that the gain upon the redemption was ordinary income (*Fairbanks* v. *United States,* 306 U. S. 436), and the loss upon the redemption was a bad debt (*Lebanon Nat. Bank* v. *Commissioner,* 76 F. 2d 792 (C.A. 3); *Commonwealth Commercial State Bank* v. *Lucas,* 41 F. 2d 111 (C.A.D.C.); *Pacific Nat. Bank* v. *Commissioner,* 91 F. 2d 103 (C.A. 9)). Section 117(f) was enacted in order to change this rule; it expressly provided that amounts received upon the retirement of bonds, notes, etc., should be considered as amounts received in exchange therefor. There are no authorities holding that where bonds are *exchanged* for other property, and the taxpayer sustains a loss, the taxpayer may deduct the loss as a bad debt.

claims against) the old company for other property, and the taxpayers sustained losses, it follows *a fortiori* that they are precluded from claiming deductions as bad debts. See also *Spring City Co.* v. *Commissioner,* 292 U. S. 182, 189, in which it was held that the ordinary loss and bad debt provisions are mutually exclusive.

Since the transactions in question were exchanges of property for other property and actually resulted in losses, the taxpayers were entitled to deduct the losses (assuming that they could be recognized) under either subdivision (e) (ordinary losses) or subdivision (j) (capital losses) of Section 23, whichever was applicable. If the obligations of the old company held by the taxpayers fall within the definition of capital assets under Section 117 (b) of the Revenue Act of 1936 (Appendix, *infra,* pp. 14-15), then the losses were capital losses and subject to the limitations of Section 117 (d) (Appendix, *infra,* p. 15), namely, $2,000 plus capital gains. Otherwise, the losses are ordinary losses and deductible in full under subdivision (e). The choses in action exchanged by the taxpayers for stock in the new corporation, not having been stock in trade of the taxpayers or property held primarily for sale to customers within the meaning of Section 117 (b), were capital assets under the statute (this does not appear to be disputed by the taxpayers) and the limitation on capital losses contained in Section 117 (d) would apply. Accordingly, the court below prop-

erly held that the losses were capital losses, and, if recognizable, to be treated as such.

b. The principal ground upon which the taxpayers base their petition is that the court below did not properly construe Section 112 (l) [5] of the Internal Revenue Code, as added by the 1943 Act (Appendix, *infra,* pp. 15-16) (Pet. 5; Br. 13-17); that section was not on the books when the Commissioner sent out his 30-day letters on March 19, 1941 (R. 24, 67). The Commissioner's notices show that he took the position that no gain or loss should be recognized under the circumstances of this case because the transaction was a reorganization under Section 112 (g)(1)(B) of the Revenue Act of 1936. (R. 29, 73.) His position was consistent with the general rule subsequently laid down in Section 112 (l) of the Internal Revenue Code. But with respect to an exchange occurring prior to January 1, 1943, the amendment provides that the gain or loss shall be recognized or not recognized to the extent that it would be recognized or not recognized under the latest treatment of such exchange by the taxpayer prior to December 15, 1943, in connection with his tax liability for such year. The taxpayers argue that under this provision they are entitled to treat the losses as

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[5] This section would not apply to M. L. Benedum's claim against the debtor as an endorser of the latter's note, because that claim is obviously not a security; furthermore, it has been held that demand notes are not securities within the meaning of Section 112 (l). *Pacific Public Service Co.* v. *Commissioner,* 154 F. 2d 713 (C.A. 9).

partially bad debts under Section 23 (k) of the Revenue Act of 1936 (Appendix, *infra*, pp. 13-14) because they had consistently taken that position up to and through December 15, 1943. (Br. 16-17.) The court below properly decided, however, that Section 112 (l) of the Internal Revenue Code relates only to the *recognition* of gain or loss arising from reorganizations under Section 77 B of the Bankruptcy Act, that it does not authorize *deductions*, and that it does not (R. 114) "confer upon the taxpayer the extraordinary power of making his own law of deductions." The taxpayers' prior treatment of the losses shows that they are now to be considered as recognized, and the respondent does not dispute that fact, but there is nothing in Section 112 (l) requiring that these recognized losses are now to be treated, for deduction purposes, otherwise than the 1936 Act requires them to be, if recognized. And, as we have shown above (*supra*, pp. 6-9), they are plainly capital losses under that Act.

The taxpayers have cited no case in which it was held, under similar circumstances, that a deduction could be taken as a bad debt or as a partially bad debt. There is no conflict of decisions. *Henry* v. *Commissioner*, 7 T.C. 228, cited by the taxpayers (Pet. 6; Br. 17-18), involves the different question of the basis of new stock acquired in a reorganization under Section 77 B of the Bankruptcy Act and whether or not a stock loss was recognized, within the meaning of Section 112(l) of the Inter-

nal Revenue Code, where a taxpayer previously claimed a deduction as a bad debt and the deduction had been disallowed. The Tax Court held that a loss had not been recognized. Here, as stated above, the taxpayers urge that a loss was recognized and the Collector does not dispute that fact; he merely contends that, though recognized, it was not a bad debt, and upon that point the *Henry* case has no bearing. The cases of *Bingham* v. *Commissioner,* 105 F. 2d 971 (C.A. 2), and *Commissioner* v. *Spreckels,* 120 F. 2d 517 (C.A. 9), cited by the taxpayers (Br. 15-16), involve such substantially different facts that they throw no light on the present case.

2. In the case of M. L. Benedum, there is also serious doubt as to whether the petition for a writ of certiorari was timely. The original judgment in his case was entered on February 14, 1950 (R. 119); a suggestion was made informally with respect to the effect of the original opinion on a small part of the refund claimed by Sarah N. Benedum, but no such suggestion was made with respect to M. L. Benedum and none could have been made because he had already deducted the statutory limit of capital losses, i.e. $2,000. Nothing was done with respect to the judgment in his case until May 18, 1950 (more than 90 days after the original judgment), when counsel for the taxpayers, by a letter addressed to the Clerk,[6] asked the court to change the

[6] This letter does not appear in the record.

date of the judgment in his case to March 14, 1950, in order to give this Court jurisdiction of a petition for a writ of certiorari. See the Statement *supra*, pp. 5-6. Accordingly, the finality of the judgment in his case was apparently never suspended. See *Morse* v. *United States*, 270 U. S. 151, 154. Cf. *Zimmern* v. *United States*, 298 U. S. 167, in which the court entered an order, within the period for certiorari, which had the effect of suspending the operation of the original decree. Since in this case no action was taken by the court or by the taxpayer until after the 90-day period, the petition in the case of M. L. Benedum would seem to be out of time. See *Dickinson* v. *Petroleum Corp.*, 338 U. S. 507; *Dept. of Banking* v. *Pink*, 317 U. S. 264.

CONCLUSION

The decision of the court below is correct and there is no conflict of decisions. There is no occasion for further review. The petition should be denied.

Respectfully submitted,

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JULY, 1950.

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(e) *Losses by Individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or

(3) of property not connected with the trade or business, if the loss arises from fires, storms, shipwreck, or other casualty, or from theft. No loss shall be allowed as a deduction under this paragraph if at the time of the filing of the return such loss has been claimed as a deduction for estate tax purposes in the estate tax return.

* * * * *

(j) *Capital Losses.*—Losses from sales or exchanges of capital assets shall be allowed only to the extent provided in section 117 (d).

(k) *Bad Debts.*—Debts ascertained to be worthless and charged off within the taxable year (or, in the discretion of the Commissioner, a reasonable addition to a reserve for bad debts); and when satisfied that a debt is recoverable only in part, the Commissioner

may allow such debt, in an amount not in excess of the part charged off within the taxable year, as a deduction.

* * * *

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *General Rule.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:

100 per centum if the capital asset has been held for not more than 1 year;

80 per centum if the capital asset has been held for more than 1 year but not for more than 2 years;

60 per centum if the capital asset has been held for more than 2 years but not for more than 5 years;

40 per centum if the capital asset has been held for more than 5 years but not for more than 10 years;

30 per centum if the capital asset has been held for more than 10 years.

(b) *Definition of Capital Assets.*—For the purposes of this title, "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer prima-

rily for sale to customers in the ordinary course of his trade or business.

* * * *

(d) *Limitation on Capital Losses.*—Losses from sales or exchanges of capital assets shall be allowed only to the extent of $2,000 plus the gains from such sales or exchanges. * * *

* * * *

(f) *Retirement of Bonds, Etc.*—For the purposes of this title, amounts received by the holder upon the retirement of bonds, debentures, notes, or certificates or other evidences of indebtedness issued by any corporation (including those issued by a government or political subdivision thereof), with interest coupons or in registered form, shall be considered as amounts received in exchange therefor.

Internal Revenue Code:

SEC. 112. RECOGNITION OF GAIN OR LOSS.

* * * *

(l) [As added by Section 121 (b) of the Revenue Act of 1943, c. 63, 58 Stat. 21] *Exchanges by Security Holders in Connection With Certain Corporate Reorganizations.*—

(1) *General rule.* No gain or loss shall be recognized upon an exchange consisting of the relinquishment or extinguishment of stock or securities in a corporation the plan of reorganization of which is approved by the court in a proceeding described in subsection (b)(10), in consideration of the acquisition solely of stock or securities in a

corporation organized or made use of to effectuate such plan of reorganization.

(2) *Exchange occurring in taxable years beginning prior to January 1, 1943.*—If the exchange occurred in a taxable year of the person acquiring such stock or securities beginning prior to January 1, 1943, then, under regulations prescribed by the Commissioner with the approval of the Secretary, gain or loss shall be recognized or not recognized—

(A) to the extent that it was recognized or not recognized in the final determination of the tax of such person for such taxable year, if such tax was finally determined prior to the ninetieth day after the date of the enactment of the Revenue Act of 1943; or

(B) in cases to which subparagraph (A) is not applicable, to the extent that it would be recognized or not recognized under the latest treatment of such exchange by such person prior to December 15, 1943, in connection with his tax liability for such taxable year.

(26 U.S.C. 1946 ed., Sec. 112.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.112 (l)-2 [as added by T.D. 5402, 1944 Cum. Bull. 229, 234, 235, 236]. *Recognition of Gain or Loss upon Exchange in Taxable Year Beginning Prior to January 1, 1943.* —(a) * * *

(b) *No final determination prior to May 25, 1944.* If an exchange described in section 112 (l) (1), or so much of section 112 (c) or (e) as relates to section 112 (l) (1), occurred in a taxable year beginning prior to January 1, 1943, and the tax for such taxable year was not finally determined prior to May 25, 1944, the recognition or nonrecognition of gain or loss shall depend upon the position last maintained by the taxpayer, prior to December 15, 1943, relative to the character of such exchange as one in which the entire amount of gain or loss is recognized or one in which all or a part of the gain or loss is not recognized. For the purposes of this section, such position must have been formally maintained by the taxpayer in his return or amended return for the taxable year, in a claim for refund, in a proceeding before a court or The Tax Court or the Board of Tax Appeals, or in some formal action taken in connection with a determination or proposed determination of his tax liability for such taxable year. If the taxpayer formally maintained that such exchange constituted a transaction upon which the entire amount of the gain or loss is recognized, then gain or loss, in the amount realized upon such exchange, shall be recognized. If the taxpayer formally maintained that such exchange constituted a transaction upon which all or a part of the gain or loss is not recognized, then gain or loss shall not be recognized except to the extent that gain is recognized under section 112 (c).

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REPLY BRIEF ON BEHALF OF PETITIONER M. L. BENEDUM.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

REPLY BRIEF ON BEHALF OF PETITIONER M. L. BENEDUM.

This brief is filed in reply to that portion of Respondent's brief which questions the timeliness of the petition of M. L. Benedum for writ of certiorari.

On the face of the record the petition was timely. The judgment of the Court of Appeals which Petitioner seeks to have reviewed by this court is dated March 14, 1950 (R 127), and the petition for writ of certiorari was filed on June 8, 1950, well within the 90 days allowed therefor.

Said judgment of March 14, 1950 is an amended judgment, same having been entered pursuant to order of the Court of Appeals dated May 31, 1950 directing that "the Clerk of this court attest judgment amended

to bear date of March 14, 1950 * * *", (R 126). The prior judgment which was amended as aforesaid, and which reversed the judgment of the District Court was entered February 14, 1950, pursuant to the original opinion of the Court of Appeals. In questioning the timeliness of the petition of M. L. Benedum, Respondent in reality is complaining of the action of the Court of Appeals in amending the judgment of February 14, 1950, and erroneously states that no action was taken by that court until more than 90 days after the entry of said judgment. A brief reference to the record will readily disclose that the Court of Appeals, in directing the amendment of its prior judgment, did so in accordance with its order entered March 14, 1950 amending the original opinion (R 121).

The case of M. L. Benedum was docketed at No. 10,012 in the Court of Appeals, and the case of his wife, Sarah N. Benedum, was docketed to No. 10,011. The two cases were consolidated in the Court of Appeals for brief, appendix and argument (R. 104a), and the cases were considered together by the Court of Appeals (R. 111, 121). The last line of the original opinion filed February 14, 1950 directed that "The judgments in both cases will be reversed" (R. 117), and pursuant to this direction judgment was entered in each case on February 14, 1950, reversing the judgment of the District Court (R. 118, 119). Thereafter a factual error in the opinion having been brought to the attention of the court, by order filed February 28, 1950, the mandates in both cases were stayed (R. 120), and under date of March 14, 1950, the court entered an order amending the opinion of February 14, 1950, in the following respects, (1) by correcting the factual error in the original opinion, (2) by striking the

last line of the opinion, and (3) by adding the following words at the end of the opinion (R. 121, 122):

> "Mr. Benedum has exhausted his allowable capital loss deduction but Mrs. Benedum has not. The Commissioner has agreed to treat Mrs. Benedum's claim to a deduction for a bad debt as a sufficient claim for recognition. Therefore, the judgment in case No. 10,011 will be reversed and the cause remanded to the district court for the entry of judgment in accordance with such recognition. The judgment in case No. 10,012 will be reversed."
>
> "By the Court: William H. Hastie, Circuit Judge. March 14, 1950. "

Following this amendment to the opinion, an amended judgment was entered in the case of Sarah N. Benedum on March 14, 1950 (R. 122), but through an oversight an amended judgment was not then entered in the case of M. L. Benedum as directed by the concluding sentence of the order amending the opinion.

It thus appears that the Court of Appeals did act on March 14, 1950, first by striking from the opinion of February 14, 1950, the direction that "the judgments in both cases will be reversed", and secondly by directing that "the judgment in case No. 10,012 will be reversed".

It seems clear that the failure to enter an amended judgment in the case of M. L. Benedum upon the entry of the order of March 14, 1950, was an oversight in the nature of a clerical error which the court had ample power to correct, as it did by its order of May 31, 1950 (R. 126) directing that its prior judgment be amended to bear date of March 14, 1950. *Ommen v. Talcott,* 180

Fed. Reporter, 925. Rule 60 (a) of Federal Rules of Civil Procedure relating to the correction of clerical mistakes in judgments in District Courts is declaratory of the general law on the subject.

It is respectfully submitted that the petition of M. L. Benedum for writ of certiorari was timely.

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July 26, 1950.